



**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**48 CFR Part 9**

**RIN: 3133-AE85**

**NCUA Suspension and Debarment Procedures**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed Suspension and Debarment Procedures with request for comments.

**SUMMARY:** The NCUA Board (Board) proposes to adopt suspension and debarment procedures to establish an administrative process protecting the Federal Government's interest in only doing business with presently responsible contractors. This proposal sets forth the NCUA's proposed policies for suspension and debarment and establishes administrative proceedings for contractors subject to the policies.

**DATES:** Comments must be received on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web Site: <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx>. Follow the instructions for submitting comments.
- E-mail: Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name]—Comments on Proposed Suspension and Debarment Procedures” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

*Public Inspection:* You can view all public comments on the NCUA’s website at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except for those that cannot be posted for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments at the NCUA’s headquarters at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:** Kevin Tuininga, Associate General Counsel for Administrative Law, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone: (703) 518-6543.

## **SUPPLEMENTARY INFORMATION**

- I. Background
- II. The Proposed Procedures
- III. Regulatory Procedures

### **I. Background**

The NCUA is updating and modernizing its procurement processes to ensure it implements best practices in spending funds available to it, including those in the agency's Operating Fund and the National Credit Union Share Insurance Fund. Although the NCUA is not required to follow government-wide acquisition laws and regulations, it believes those laws and regulations include best practices developed over years of seeking public comment on expenditure processes. Suspension and debarment remedies have proven to be an important component of government procurement processes. Thus, the NCUA believes it should adopt suspension and debarment procedures to protect both itself and other Executive Branch agencies.

### **II. The Proposed Rule**

This proposed rule sets forth standards and procedures governing suspension and debarment of NCUA contractors, including subcontractors, management officials, key employees and affiliated business entities of such contractors, to protect the Federal Government's interest in only doing business with presently responsible contractors. The

NCUA is not required to follow the Federal Acquisition Regulation (FAR) but uses its principles for best practice guidance. The FAR section on suspension and debarment is located at 48 CFR part 9, subpart 9.4.

This proposed rule is similar to the suspension and debarment procedures other federal entities use, which have been developed after extensive public comment and withstood judicial scrutiny. However, the rule may depart in certain respects from the procedures used by other federal entities. With respect to due process provisions, the NCUA seeks to provide at least the same protections to contractors that other agencies have provided in developing their suspension and debarment procedures.

## **II. Summary of the Proposed Rule**

The proposed rule is comprised of eight sections. Section A describes the purpose of the proposed procedures, which is to ensure the NCUA solicits offers from and awards contracts to only presently responsible contractors. While not precisely defined, the proposed procedures use the term “presently responsible” in a manner consistent with its traditional use in the suspension and debarment context: A contractor must be able to “contract with the government in a responsible manner on a going-forward basis.”<sup>1</sup> In other words, based on available evidence, “the contractor [must] be trusted to perform in accordance with contract requirements, governing law, and overall, to conduct itself ethically.”<sup>2</sup> In addition to requiring this standard of its prime contractors, the NCUA will

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<sup>1</sup> Robert F. Meunier, Trevor B. A. Nelson, IS IT TIME FOR A SINGLE FEDERAL SUSPENSION AND DEBARMENT RULE? 46 Pub. Cont. L.J. 553, 587 n.176 (2017).

<sup>2</sup> *Id.*

apply the present responsibility threshold in determining whether to consent to subcontracts.

Section A also specifies in footnote 2 that the procedures apply to both the NCUA in its agency capacity and the NCUA Board in its capacity as conservator or liquidating agent for an insured credit union. While the NCUA is not required to follow the FAR in any capacity, the Board believes the purpose of suspension and debarment remedies are important for all of its work, regardless of context. In liquidations, for example, contracting expenses are paid as administrative expenses, the most senior position in the claims priority of 12 CFR 709.5(b). The National Credit Union Share Insurance Fund, uninsured shareholders, and pre-liquidation contractors, on the other hand, are lower priority creditors that only receive funds to the extent they remain after administrative expenses are paid. Thus, the Board believes it is equally important to protect the integrity of the contracting process in the conservatorship and liquidation contexts. The procedures would not apply to any legal services contracts, whether provided on behalf of the NCUA as agency or the NCUA Board as conservator or liquidating agent, as those contracts are managed through separate procedures administered by the NCUA's Office of General Counsel.

Applying suspension and debarment remedies to a conservator or liquidating agent is a departure from the general rule in the NCUA's Acquisition Policy Manual. Although the Board may follow many principles of its Acquisition Policy Manual as conservator or liquidating agent, those activities are not expressly subject to the Manual to avoid any

hindrance of special rights the Federal Credit Union Act (FCU Act) grants to the liquidating agent or conservator, including contract repudiation rights. The Board does not have similar concerns with respect to suspension and debarment processes because they are, in effect, remedial, and will not materially restrict the Board's statutory contracting rights as conservator or liquidating agent. However, as with any other aspect of these proposed procedures, the Board welcomes public comment on this bifurcated approach.

Section B sets forth the NCUA's authority for proposing and adopting agency-specific suspension and debarment procedures. This section identifies the FCU Act generally and, specifically, 12 U.S.C. 1766(i)(2) as relevant authority. Other provisions of the FCU Act, including 12 U.S.C. 1789, also directly support the Board's action.

Section C covers the definitions of terms used in the proposed procedures. Among other key terms, Section C defines "affiliates" and "imputation" for purposes of the procedures and describes the "present responsibility" concept. The definitions are based on commonly accepted definitions for similar terms in the FAR and in federal contracting generally.

In addition, Section C sets forth the circumstances that warrant a fact-based debarment, a conviction-based debarment, and a suspension. Fact-based debarments would require the NCUA to establish relevant circumstances by a preponderance of the evidence. Suspensions, in contrast, are permitted under an "adequate evidence" standard, meaning

information sufficient to support a reasonable belief that a particular act or omission has occurred. The adequate evidence standard amounts to a minimal standard of proof, akin to probable cause and requiring some degree of corroboration but not to a preponderance level. Although they can be imposed under a lesser evidentiary standard, suspensions are generally of shorter duration than debarments.

Section D lists the responsibilities of various NCUA employees in implementing the proposed procedures. Pursuant to this section, the Deputy General Counsel serves as the suspending and debarring official (SDO) who has responsibility to make final decisions under the procedures. Locating this responsibility outside of the NCUA's Office of the Chief Financial Officer (OCFO) protects objectivity and contractor due process by separating suspension and debarment decisions from the division that generally awards and administers contracts.

The procedures require all NCUA offices to refer circumstances that may warrant suspension and debarment to the NCUA contracting officer and the Office of General Counsel attorney assigned to coordinating suspension and debarment proceedings (SDO Admin). However, the NCUA expects most referrals to originate with NCUA contracting officers, who are responsible for overseeing the bulk of the NCUA's contracting activities. The procedures require that circumstances involving potential criminal activity also be referred to the NCUA's Office of Inspector General.

The proposed procedures identify a non-exhaustive list of circumstances that should be referred to the NCUA contracting officer, the SDO Admin, and the OIG (as applicable).

These circumstances include the following:

1. contractor fraud, dishonesty or unethical behavior;
2. repeated or severe contract performance issues;
3. unmitigated or undisclosed conflicts of interest; and
4. improper invoicing or questionable costs.

These general referral criteria are in addition to circumstances where an NCUA office might discover evidence of more specific circumstances that may support fact-based or conviction-based debarments or suspensions, as identified in Section C.

Even after a referral results in suspension or debarment, the proposed procedures give the Executive Director authority to approve the award of a contract or subcontract to an ineligible contractor for “compelling reasons”, documented in writing. This provision does not expressly limit the Executive Director’s discretion, as such circumstances are difficult to anticipate. However, the NCUA expects to encounter such compelling reasons on rare occasions, if ever.

Section E explains the impact of a suspension or debarment. A suspended or debarred contractor or subcontractor will be ineligible to receive contract solicitations, awards, or subcontracting consents from Executive Branch agencies. The FAR permits other agencies to proceed with an award only if the agency’s head determines there is a



compelling reason for an exception.<sup>3</sup> The proposed procedures would subject the NCUA to this same limitation with respect to contractors suspended or debarred by other Executive Branch agencies. Thus, the NCUA in any capacity, subject only to the Executive Director's authority discussed above, will not solicit, award, or consent to contracts or subcontracts involving suspended or debarred contractors, regardless of the agency that issued the suspension or debarment.

In general, the FAR permits agencies to continue contracts or subcontracts entered into before the NCUA initiates suspension or debarment proceedings. A proceeding is deemed initiated when entered into the System for Award Management,<sup>4</sup> which provides notice to other agencies. As with prime contractors, when another agency has debarred, suspended, or proposed for debarment a subcontractor for any subcontract that requires the NCUA's consent, the NCUA's contracting officers may not consent unless the NCUA's Executive Director provides compelling reasons in writing.

Section F recites the process for NCUA offices to refer matters to the SDO Admin and the SDO for a determination. It specifies the contents of action referral memorandums and periods for referrals to the SDO Admin. The general referral period within which an NCUA office should refer a matter to the SDO Admin is 30 days but, for referrals based on convictions (defined to include criminal convictions or civil judgments), the procedures impose a shorter, 10-day, referral period. Section F also lists pertinent

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<sup>3</sup> 48 CFR 9.405(a).

<sup>4</sup> The System for Award Management is the General Services Administration's government-wide support system for contract awards, which includes a list of parties excluded from Executive Branch contracts.

documents that should be included with an action referral memorandum, which together comprise the referral materials.

Section G describes the decision-making process the NCUA proposes to use once a matter has been presented to the SDO. This section requires the SDO Admin to coordinate any proposed action with the Interagency Suspension and Debarment Committee, composed of suspension and debarment representatives from federal agencies. The Board believes this coordination process will ensure the NCUA works with other agencies and is fully informed of circumstances that may affect ongoing or pending procurements.

Section G includes a list of potential actions the SDO can take after considering a presented matter and action referral memorandum, including rejecting the memorandum, issuing a show cause letter or notice of suspension, or issuing a notice of proposed debarment. Each option lists requirements and the contents to be included in related notices to contractors. For notices of suspension or proposed debarment, the contractor will receive the action referral memorandum and may have access to the entire administrative record, on request, unless the law or parallel proceedings warrant its partial or complete redaction or withholding.

The procedures provide a maximum of 30 days from receipt of a notice for a contractor to respond. In the case of a notice of suspension or notice of proposed debarment, the contractor may respond with a presentation of matters in opposition (PMIO). The PMIO

can be presented in person or in writing and may occur through a representative. The contractor may also request meetings with the SDO. The SDO may transcribe meetings and conference calls at the SDO's discretion. The proposed procedures require the SDO to consider all matters in the PMIO in the SDO's final decision. If a contractor fails to respond to notices the SDO issues, the existence of the basis for suspension or debarment is deemed admitted.

The proposed procedures provide for a fact-finding proceeding only for fact-based actions (those not based on a conviction or civil judgment) where the SDO determines one or more genuine issues of material fact exist. In such a case, the SDO will appoint an individual to oversee the proceeding, generally scheduled within 60 days of receiving the PMIO, at which the contractor can appear with counsel, submit evidence, and examine agency witnesses. The procedures set recommended timeframes and requirements for fact-finding proceedings, including the form of a final decision and composition of the administrative record.

Fact-finding proceedings are transcribed unless otherwise mutually agreed upon, and the contractor can obtain a transcript of the proceedings at its request and at its cost. The standard of proof for determining the disputed facts is preponderance of the evidence. These processes and requirements are consistent with the long-established due process FAR-based agencies have established in suspension and debarment procedures.

From the point of referral through a final determination, the NCUA will maintain and document all information considered by the SDO to include the action referral memorandum, the PMIO (including mitigating factors) and transcripts of any fact-finding proceedings. This is the administrative record.

The SDO's final determination is issued in writing, based on the administrative record. Decisions will generally be issued within 30 or 45 working days after closing the administrative record, depending on whether the proceeding is conviction based or fact based. The administrative record will be deemed closed when the SDO Admin submits all evidence to the SDO for a final decision. The SDO Admin will advise the contractor in writing promptly after the administrative record has been closed, including the date it was closed.

The final decision may reflect a determination (i) not to debar the contractor; (ii) to terminate a suspension; or (iii) to debar the contractor. Further, the SDO and the contractor are free to negotiate an administrative agreement resolving all or some issues at any point in the proceedings. Other than as limited by law, the proposed procedures set no limitations on the parties' discretion with respect to the terms and conditions of administrative agreements.

Section G also specifies the contractor's right to seek judicial review of an adverse decision from the SDO. On this issue, the Board invites comment on whether to permit additional administrative appeal rights within the NCUA. Although Interpretive Ruling

and Policy Statement 11-1 provides that “the NCUA Board serves as the final administrative decision maker for major disputes that are not otherwise covered by this IRPS or Parts 709, 745, 792 or 747” of NCUA regulations, the Board does not intend at this time for this general appeal right to apply to suspension and debarment procedures.<sup>5</sup> Nevertheless, the Board is open to providing some further level of appeal within the agency, based on the administrative record. While additional appeal rights can require additional resources and significantly extend final determinations, they could also strengthen the administrative record against challenges in court. If the Board were to grant additional administrative appeals, it would adopt processes within the final procedures that are similar to those permitted for creditor claim appeals and insurance determination appeals in 12 CFR 709.8(c)(1) and 745.202, respectively.

Section H specifies permitted activities after imposition of a suspension or debarment. Until such condition is removed, a contractor may continue to perform current contracts (unless an agency terminates or voids them), subject to the following conditions (except as otherwise provided in the procedures):

1. New work may not be added.
2. Options may not be exercised.
3. Duration may not be otherwise extended.
4. New task orders may not be issued (except up to a guaranteed minimum).
5. New orders may not be placed.

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<sup>5</sup> <https://www.ncua.gov/Legal/Documents/IRPS/IRPS2011-1.pdf>.

The procedures would apply to actions initiated by the NCUA on or after the effective date of a final rule adopting the procedures, regardless of the date of the activities or circumstances that give rise to subsequent NCUA action under the procedures. Once the Board adopts a final version, the procedures will be posted on the NCUA's web site, in addition to being published in the *Federal Register*. The Board invites comment on any and all of the matters discussed above and on any additional matters addressed in the draft procedures included at the end of this notice.

### **III. Regulatory Procedures**

#### **A. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA) requires the NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small entities (currently defined by the NCUA as federally insured credit unions with under \$100 million in assets). In this case, the NCUA does not expect that the proposed Suspension and Debarment Procedures would ever apply to a federally insured credit union. In addition, the NCUA does not expect that the Procedures would apply to a substantial number of small businesses, as defined in the RFA and as further established by the Office of Advocacy of the Small Business Administration.

The proposed rule closely follows the suspension and debarment procedures of the Federal Acquisition Regulation, which already applies to government contractors, without imposing any additional economic burden. To the extent of any variation from

the Federal Acquisition Regulations, the proposed Procedures contain no recordkeeping or substantive regulatory requirements, varying only in adjudication processes. The proposed rule therefore will not have a significant economic impact on a substantial number of federally insured credit unions under \$100 million in assets or on other small entities as defined by the Small Business Administration. Accordingly, the NCUA has determined and certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. No regulatory flexibility analysis is required.

Notwithstanding the NCUA's determination that this rule will not have a significant economic impact on a substantial number of small entities, the NCUA Board invites comments regarding less burdensome alternatives to this rule that will meet the NCUA's objectives as described in the preamble.

## **B. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden.<sup>6</sup>

For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. The proposed rule will not create any new paperwork burden that meets the definition of an information collection. Thus, the NCUA has determined that the terms of this proposed rule do not

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<sup>6</sup> 44 U.S.C. 3507(d).

increase the paperwork requirements under the PRA and regulations of the Office of Management and Budget.

### **C. Executive Order 13132**

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. This proposed rule would not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

### **D. Assessment of Federal Regulations and Policies on Families**

The NCUA has determined that this proposed rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).



By the National Credit Union Administration Board on March 15, 2018.

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Gerard Poliquin

Secretary of the Board

For the reasons discussed above, the Board proposes to adopt the following NCUA Suspension and Debarment Procedures:

### **NCUA Suspension and Debarment Procedures**

#### **A. Purpose**

The purpose of these suspension and debarment procedures is to establish an administrative process to protect the Government's interest in only doing business with presently responsible contractors. The NCUA<sup>1</sup> shall only solicit offers from, award contracts to, and consent to subcontracts with presently responsible contractors. These procedures implement the NCUA's policies for suspension and debarment and establish administrative proceedings for contractors subject to the policies.

#### **B. Authority**

The NCUA's suspension and debarment authority derives from the Federal Credit Union Act 12 U.S.C. 1751 *et seq.*, and 12 U.S.C. 1766(i)(2), specifically. The NCUA is not required to follow the Federal Acquisition Regulation but uses the principles therein for best practice guidance. The Federal Acquisition Regulation (FAR) section on suspension and debarment is located at 48 CFR Part 9, Subpart 9.4. The NCUA also has its own Acquisition Policy Manual.

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<sup>1</sup> Throughout these procedures, unless otherwise noted, the "NCUA" refers the NCUA in its agency capacity and also to the NCUA Board as conservator or liquidating agent for an insured credit union. Legal services contracts the NCUA enters into in any capacity, through the Office of General Counsel, are not subject to these suspension and debarment procedures.

### **C. Definitions**

1. Action Referral Memorandum (ARM). The investigative report developed and compiled by an NCUA office recommending that the Suspending and Debarring Official (SDO) take a suspension or debarment action against a contractor.
2. Administrative Agreement. Administrative Agreements are usually entered into in lieu of suspension or debarment actions. Typically the agreements include acceptance of responsibility, voluntary exclusion by the contractor, some provision of restitution, any contractor responsibilities with respect to codes of conduct, training, and the contractor's promise to report progress to the NCUA, and generally include consequences for breach of the agreement. The terms of the Administrative Agreement and contents will be determined on a case-by-case basis.
3. Administrative Record. The entire record of information and proceedings. This includes all information considered by the SDO that is the basis of the final decision.
4. Affiliates. Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (1) either one controls or has the power to

control the other, or (2) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor that has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

5. Civil Judgement. A judgement or finding of a civil offense by a court of competent jurisdiction.
6. Contractor. Contractor means any individual or other legal entity that: (1) directly or indirectly (for example, through an affiliate), submits offers for, or is awarded, or reasonably may be expected to submit offers for, or be awarded, a Government contract or a subcontract under a Government contract; or (2) conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative or another contractor.
7. Debarment. A final decision made by the SDO to exclude a contractor from Government contracting and Government-approved subcontracting or covered transactions for a reasonable, specified period (usually not exceeding three

years). A contractor is first proposed for debarment and afforded an opportunity to present its defenses and mitigating factors.

a. Fact-Based Debarment. The cause for the debarment is based on factual circumstances (for example, history of poor performance or willful misconduct). The NCUA must be able to prove the action by a “preponderance of the evidence.” Preponderance of the evidence means that the fact(s) at issue are more likely than not (over 50%) to be true. A contractor, based upon a preponderance of the evidence, can be debarred for any of the following:

i. Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as:

1. willful failure to perform in accordance with the terms of one or more contracts; or
2. a history of failure to perform, or of unsatisfactory performance of, one or more contracts.

ii. Violations of a Drug-Free Workplace, as indicated by:

1. failure to comply with the requirements of a Drug-Free Workplace; or
2. such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to

make a good faith effort to provide a drug-free workplace.<sup>2</sup>

- iii. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States.<sup>3</sup>
- iv. Commission of an unfair trade practice.<sup>4</sup>
- v. Delinquent Federal taxes in an amount that exceeds \$3,500.  
Federal taxes are considered delinquent for purposes of this provision if the *tax liability is finally determined (i.e. assessed) and the taxpayer is delinquent in making payment.*
- vi. Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of:
  - 1. violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations<sup>5</sup>;
  - 2. violation of the civil False Claims Act<sup>6</sup>; or

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<sup>2</sup> 41 U.S.C. Chapter 81.

<sup>3</sup> Section 202 of the Defense Production Act; Public Law 102-558.

<sup>4</sup> Section 201 of the Defense Production Act; Public Law 102-558.

<sup>5</sup> Title 18 U.S.C.

<sup>6</sup> 31 U.S.C. 3729-3733.

3. significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments.
  - vii. A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, not in compliance with Immigration and Nationality Act employment provisions.<sup>7</sup> Such determination is not reviewable in the debarment proceedings.
  - viii. A contractor has miscertified its status as a minority- and/or women-owned business.
  - ix. Any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.
- b. Conviction-Based Debarment. A debarment action based on a conviction or civil judgement. A contractor can be debarred for a conviction or civil judgement based on one or more of the following circumstances:
- i. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.

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<sup>7</sup> Executive Order 12989, as amended by Executive Order 13286.

- ii. Violation of Federal or State antitrust statutes relating to the submission of offers.
- iii. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property.
- iv. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States.<sup>8</sup>
- v. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

8. Imputation. Attributing the misconduct of an individual or organization to another individual or organization by virtue of the latter’s knowledge or implied knowledge of the misconduct. An agency may impute the basis of a suspension or debarment through the following relationships: individual to organization; organization to individual; individual to individual; and joint ventures.

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<sup>8</sup> Section 202 of the Defense Production Act; Public Law 102-558.



9. **Indictment.** An indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.
10. **Presentation of Matters in Opposition (PMIO).** The contractor may submit matters in opposition to the suspension or proposed debarment. The contractor may submit matters in person, in writing, or through a representative. The contractor may also use a combination of those methods.
11. **Present Responsibility.** A contractor is presently responsible if the contractor is ethical, honest, competent, and has not acted in any way that reveals a lack of business integrity or business honesty, or an inability to satisfactorily perform Government contracts.
12. **System for Award Management (SAM).** SAM is the exclusion database that applies across the Executive Branch. SAM is an official U.S. Government system.
13. **Suspension.** A suspension is an immediate, but temporary (usually 12 months), measure imposed by the SDO, rendering a contractor ineligible to

receive new Government contracts or subcontracts, pending the outcome of a legal proceeding or investigation that could give rise to a debarment.<sup>9</sup>

a. Adequate Evidence for Suspension. The NCUA must have adequate evidence and an immediate need to suspend a contractor. Adequate evidence is information sufficient to support a reasonable belief that a particular act or omission has occurred. A contractor can be suspended upon adequate evidence of one or more the following:

- i. Commission of fraud or a criminal offense in connection with  
(i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.
- ii. Violation of Federal or State antitrust statutes relating to the submission of offers.
- iii. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property.
- iv. Violations of a Drug-Free Workplace, as indicated by:
  1. failure to comply with the requirements of a Drug-Free Workplace; or

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<sup>9</sup> If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests an extension, in which case it may be extended for six months. Suspensions cannot extend beyond 18 months unless legal proceedings have been initiated within that period. The NCUA shall notify the Department of Justice of the proposed termination of the suspension, at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

2. Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace.<sup>10</sup>
- v. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States.<sup>11</sup>
- vi. Commission of an unfair trade practice.<sup>12</sup>
- vii. Delinquent Federal taxes in an amount that exceeds \$3,500.  
Federal taxes are considered delinquent for purposes of this provision if the *tax liability is finally determined (i.e. assessed) and the taxpayer is delinquent in making payment.*
- viii. Knowing failure by a principal, until three years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of:
  1. violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations;<sup>13</sup>

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<sup>10</sup> 41 U.S.C. Chapter 81.

<sup>11</sup> Section 202 of the Defense Production Act; Public Law 102-558.

<sup>12</sup> Section 201 of the Defense Production Act; Public Law 102-558.

2. violation of the civil False Claims Act;<sup>14</sup> or
  3. significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments.
- ix. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

An indictment for any of the foregoing will be considered adequate evidence for suspension.

#### **D. Responsibilities**

1. NCUA Executive Director. The Executive Director has the authority to approve the award of a contract or subcontract to an ineligible contractor for compelling reasons. Decisions to award a contract or subcontract to ineligible contractors must be documented in writing in advance of an award.
2. The Suspending and Debarring Official (SDO). The Deputy General Counsel serves as the SDO. The SDO decides whether to impose a suspension and debarment action. The decision whether to suspend or debar is a business

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<sup>13</sup> Title 18 U.S.C.

<sup>14</sup> 31 U.S.C. 3729- 3733.

decision and, unless mandated by statute or executive order, is discretionary. The SDO decides whether to send out a Notice of Suspension or a Notice of Proposed Debarment, issue a Show Cause Letter, or take no action. Upon commencing a formal action, the SDO reviews the ARM, considers any PMIO submitted or presented by the contractor, and determines whether a fact-finding proceeding is necessary. The SDO may negotiate an Administrative Agreement with the contractor. The SDO's final decision is based on the ARM and the entire Administrative Record.

3. Office of the General Counsel (OGC). OGC provides legal advice regarding the suspension and debarment program to the NCUA. OGC reviews the ARM, any other notices and correspondence, the Administrative Record, the SDO decision, any Administrative Agreement and other documents for legal sufficiency. OGC also reviews and concurs in any decision from the OCFO, to terminate or void contracts held by suspended, debarred, or proposed-for-debarment contractors.
4. SDO Admin. The SDO Admin is a procurement attorney in OGC. The SDO Admin receives referral packages and coordinates with the OCFO, the SDO, and other interested NCUA parties. The SDO Admin also coordinates suspension and debarment actions with other agencies and enters ineligible contractors into SAM. The SDO Admin coordinates with the OIG, when necessary and appropriate.

5. Office of the Chief Financial Officer (OCFO). OCFO contracting officers shall evaluate the responsibility of prospective contractors before award, to include checking SAM. Contracting officers shall also ensure contractor compliance with contract terms and conditions and shall coordinate appropriately with any NCUA office and the SDO Admin on a suspension and debarment action.
6. Office of Inspector General (OIG). The OIG's work may form the basis for a referral for suspension or debarment. The OIG shall raise any matters of concern resulting from audits, evaluations and investigations. Other NCUA offices may refer areas of concern to the OIG for investigation.
7. All NCUA Offices. All NCUA offices must report misconduct that may give rise to a suspension and debarment action to the NCUA contracting officer and the SDO Admin upon any indication of a cause for suspending and debarring contractors. Situations that involve possible criminal or fraudulent activities must also be referred to the OIG. Along with more specific bases for debarments and suspensions listed in Section C, the following general matters may be grounds for suspension and debarment and should be referred: contractor fraud, dishonesty, or unethical behavior; repeated or severe contract

performance issues; unmitigated or undisclosed conflicts of interest; and improper invoicing and/or questionable costs.

#### **E. Effect of Listing<sup>15</sup>**

1. Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and the FAR provides that agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines there is a compelling reason for such action. Subject to any exceptions in this policy, the NCUA shall not award new contracts, place orders exceeding the guaranteed minimum on indefinite delivery contracts, place orders under schedule contracts, add new work, exercise options, or extend the duration of a contract with any contractor debarred, suspended, or proposed for debarment. Except as otherwise provided in applicable law, a suspension and debarment action taken by the NCUA will exclude the contractor from all awards of other contracts within the Executive Branch.

- a. Current contracts. Any NCUA decision to terminate or void a current contract shall be subject to review and concurrence by OGC.

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<sup>15</sup> The nonprocurement common rule is a model rule published in the *Federal Register* and used by agencies to suspend, debar, or exclude contractors from participation in nonprocurement activities. Nonprocurement activities include grants, cooperative agreements, scholarships, fellowships, loans, loan guarantees, subsidiaries, insurance, payments for specified use, and donation agreements. FAR and NCR-based suspension and debarment actions are recognized equally by agencies regardless of which regulations they follow.

- b. Restrictions on subcontracting. When a contractor debarred, suspended or proposed for debarment is proposed as a subcontractor for any subcontract subject to NCUA consent, contracting officers shall not consent unless the Executive Director states in writing the compelling reasons to do so.<sup>16</sup>

#### **F. Procedures for Referring Matters to the SDO**

1. General. The referring office shall provide any and all facts and information giving rise to the possible suspension and debarment, including any available documentation to the SDO Admin. Conviction-based debarment matters should be referred within 10 working days of discovery and, to the extent practicable, all other matters should be referred within 30 calendar days. The referring office shall submit an ARM to the SDO Admin. The SDO Admin will coordinate the ARM with the SDO, the NCUA contracting officer and any other necessary party.
2. Contents of the ARM. The ARM must include the following information, if applicable:

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<sup>16</sup> Also, contractors shall not enter into any subcontract in excess of \$35,000, other than a subcontract for a commercially available off the-shelf item, with a party that is debarred, suspended, or proposed for debarment.



- a. Information on the contractor:
  - i. Identity of respondents (contractors/affiliates/business entities).
  - ii. Position(s) held by individuals within the business entity.
  - iii. Fictitious names or aliases.
  - iv. Current mailing addresses of named parties and/or last known business address.
  - v. Current telephone and fax numbers for named parties.
  - vi. Dun and Bradstreet identifier and/or the Commercial and Government Entity Code.
  - vii. SSN and/or birthdates of individuals.
  - viii. Listing of subsidiaries, affiliates, and parent companies.
- b. Pertinent Documents.
  - i. NCUA-affected contract numbers and copies of the contract(s).
  - ii. Listing of any other contracts the entity has with other Government agencies.
  - iii. Invoices and other cost and pricing information.
  - iv. Any indictment, legal documents, sentencing transcripts or memoranda, any judgement and conviction, settlement agreement or final order.
  - v. Explanation of current business corporate structure, if known.
  - vi. Any business-related documents (articles of incorporation).

- vii. Emails and communication between the NCUA and the contractor.
- c. Business activity of the contractor and nexus statement. The ARM must contain a narrative explaining the relationship between the conduct of the contractor and the NCUA's mission and/or activities and include a statement of the grounds for suspension and debarment. The narrative should focus on the contractor's integrity and present responsibility and why the NCUA needs protection. The narrative should show the SDO what happened in clear and concise terms. Mitigating factors that can be addressed are whether the individual(s) cooperated with any investigation, whether behavior was repetitive, and whether any individuals self-disclosed. Time critical events should be addressed (for example, whether the contractor is being considered for new award or an option is about to be exercised).
- d. Recommended course of action. The ARM shall recommend a suspension, proposal for debarment, or show cause letter. The ARM can also propose a period for the suspension or debarment.

## **G. Decision-Making Process**

- a. Upon receipt of a referral, the SDO Admin will ensure that the file has all of the required elements. The SDO Admin will coordinate with the referring office, the OIG, the NCUA contracting officer and any other necessary party if more information is needed. The SDO Admin will coordinate any proposed action with the Interagency Suspension and Debarment Committee (ISDC). The ISDC is an organization composed of suspension and debarment representatives from agencies and coordinates lead agency status among agencies. The lead agency is usually the agency with the highest amount of contracting dollars with the vendor.
- b. The SDO Admin will then forward the ARM to the SDO. Upon the receipt of a referral, the SDO will decide the appropriate action to take. After consultation with OGC, the SDO may take any of the following actions:
  - i. Reject the ARM and take no action. The SDO may determine there is not enough evidence to initiate an action. The SDO will document the decision not to take action and tell the SDO Admin. The SDO Admin will coordinate this decision within the NCUA. Continuous monitoring of the contractor may be recommended.
  - ii. Issue a Show Cause Letter. The SDO may issue a Show Cause Letter to the contractor rather than initiating a formal suspension or

debarment action. The SDO Admin will send the Show Cause Letter to the contractor through USPS certified mail, return receipt requested, and forward a copy to the NCUA contracting officer and the OIG if necessary. The letter must include all of the following:

1. A description of the alleged misconduct.
2. Notice that the misconduct may form the basis for a suspension and debarment action.
3. A request for the contractor to admit, deny, or explain the alleged misconduct.
4. A time for a contractor to respond (no more than 30 calendar days from the date of receipt).
5. Notice of consequences for failure to respond to the letter or adequately address the allegations of misconduct.

iii. Issue a Notice of Suspension or Notice of Proposed Debarment.

The SDO may begin formal proceedings by issuing a Notice of Suspension or a Notice of Proposed Debarment. Issuance of either, immediately renders the contractor (and any named affiliates) ineligible to receive Executive Branch contracts and the SDO Admin will enter the contractor's name into SAM. Notice

shall be sent by USPS certified mail, return receipt requested to the last known address of the contractor.

1. Notice of Proposed Debarment. The notice shall inform the contractor (and any named affiliates):
  - a. that it is being considered for debarment;
  - b. of the reasons/causes for the proposed debarment;
  - c. of the effect of the proposed debarment;
  - d. of the potential effect of a debarment (including scope of ineligibility);
  - e. that the contractor has 30 calendar days from receipt of the notice to respond with its PMIO in person, in writing, or through a representative with information and arguments opposing the proposed debarment; and
  - f. that the NCUA may conduct a fact-finding proceeding.

A copy of the ARM will be sent with the notice. A copy of the entire Administrative Record will be made available to the contractor upon request, unless applicable law or parallel proceedings warrant the SDO's partial or complete redaction or withholding of the Administrative Record.

2. Notice of Suspension. The notice shall inform the contractor (and its affiliates) of the following circumstances:
- a. that it has been suspended;
  - b. whether the suspension is based on indictment or other adequate evidence that the contractor has committed misconduct warranting immediate action;
  - c. that the suspension is for a temporary period, pending the completion of an investigation (if the suspension is based on indictment there is no time limit);
  - d. the cause(s) for imposing the suspension;
  - e. the effect of the suspension (including the scope of ineligibility);
  - f. that the contractor has 30 calendar days from receipt of the notice to respond with its PMIO in person, in writing, or through a representative with information and argument opposing the suspension;
- and

- g. that the NCUA may conduct a fact-finding proceeding if the SDO finds that material facts are in dispute.

A copy of the ARM will be sent with the notice. A copy of the entire Administrative Record will be made available to the contractor upon request, unless applicable law or parallel proceedings warrant the SDO's partial or complete redaction or withholding of the Administrative Record.

#### iv. Contractor's PMIO

After receiving notice of a suspension or debarment, the contractor has 30 calendar days from receipt of the notice to respond with its PMIO in person, in writing, or through a representative with information and argument opposing the proposed suspension or debarment. There is no set format for how the PMIO must be submitted. The contractor may request a meeting with the SDO. The SDO will decide whether to transcribe meetings and conference calls on a case-by-case basis. The PMIO should raise all contractor defenses, contested facts, admissions, remedial actions taken and any mitigating factors. Mitigating factors can include explaining whether the contractor (a) has effective

standards of internal control systems or adopted of such controls; (b) brought the misconduct to the attention of the NCUA in a timely manner; (c) internally investigated the misconduct; (d) cooperated fully with any NCUA investigation; (e) paid or agreed to pay restitution; (f) took appropriate disciplinary actions against individuals responsible for misconduct; (g) implemented or agreed to implement new remedial measures; (h) instituted or agreed to issue new training or ethics programs; (i) has had adequate time to eliminate the circumstances in the organization that led to the misconduct; and (j) whether management recognizes the seriousness of the misconduct and has implemented programs to prevent recurrence. The SDO must consider all matters in the PMIO in rendering a final decision. A contractor's failure to respond to the notices sent by the SDO shall be deemed an admission of the existence of the cause for suspension or debarment. In that case, the SDO may proceed to a final decision without further proceedings.

A fact-finding proceeding occurs if actions are not based upon a conviction or civil judgement and when, after receipt of the PMIO, the SDO determines there is a genuine dispute over material fact(s). A fact-finding proceeding is called to consider the fact(s). A fact-finder can be any individual appointed by the SDO to



oversee the proceeding. The contractor shall be afforded the opportunity to appear with counsel, submit documentary evidence and confront agency witnesses. The proceeding shall be transcribed unless otherwise mutually agreed upon, and the contractor can obtain a transcript of proceedings at its request and at its cost. The SDO shall attempt to schedule this proceeding within 60 calendar days of the PMIO. If there are numerous grounds for suspension and debarment, the proceeding can be limited to the grounds in dispute having a genuine issue of material fact. The disposition of the fact-finding proceeding will be documented by the SDO. The standard of proof for determining the disputed facts is preponderance of the evidence.

- c. **Compiling the Administrative Record.** During the process, the NCUA shall maintain and document all information considered by the SDO to include the ARM, the PMIO (including mitigating factors) and transcripts of any fact-finding proceedings. This is the Administrative Record. The following records, in addition to any other similar materials, shall also be included if considered by the SDO: emails; notes; contract documents; newspaper articles; and summaries of oral briefings and contractor submissions. Any information not relied on by the SDO should not be included. Once the SDO issues a final decision, the contractor may request a copy of the Administrative Record. The SDO may deny the

request or withhold or redact part of the Administrative Record if warranted under applicable law or because of parallel proceedings.<sup>17</sup> In any circumstance where the SDO redacts or withholds all or part of the Administrative Record, the SDO will provide the reasons for doing so to the contractor in writing.

- d. Final Decision. The SDO shall issue a written final decision based on the Administrative Record. The SDO shall issue a conviction-based debarment within 30 working days after closing the Administrative Record and within 45 working days of closing the Administrative Record for a fact-based suspension or debarment. The SDO has discretion to extend these deadlines. The Administrative Record will be deemed closed when the SDO Admin submits all evidence to the SDO for a final decision. The SDO Admin will advise the contractor in writing promptly after the Administrative Record has been closed, including the date it was closed. All correspondence shall be sent USPS certified mail, return receipt requested, by the SDO Admin. The SDO can take the following actions in a final decision:

- i. Not Debar the Contractor. The SDO may decide not to debar the contractor. The decision shall include, if applicable, referral to the

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<sup>17</sup> Parallel proceedings occur when two or more contemporaneous legal actions are initiated by different Government entities against the same contractor, and involving the same material facts. Often these arise when an agency has suspended or proposed a contractor for debarment and the Department of Justice is investigating or prosecuting the contractor for the same misconduct.

Notice of Proposed Debarment; a summary of proceedings; the identities of affiliates or imputed conduct; and the reasons for not debarring (for example, an Administrative Agreement; mitigating factors; or remedial measures taken by the contractor). The decision shall notify the contractor that it may request a copy of the Administrative Record and give notice of the effective date of the decision. The SDO Admin will remove the contractor's name from SAM.

ii. Terminate the Suspension. The SDO may decide to terminate the suspension. The decision shall include, if applicable, referral to the Notice of Suspension; a summary of proceedings; the identities of affiliates or imputed conduct; and the reason for terminating the Suspension (for example, an Administrative Agreement; mitigating factors; or remedial measures taken by the contractor). The decision shall notify the contractor that it may request a copy of the Administrative Record and give notice of the effective date of the decision. The SDO Admin will remove the contractor's name from SAM.

iii. Debar the Contractor. The SDO may decide to debar the contractor. This decision must be based on the preponderance of the evidence. The decision shall include, if applicable, referral to

the Notice of Proposed Debarment; a summary of proceedings; identities of affiliates or imputed conduct; the information considered by the SDO; the reasons for debarring; the scope of ineligibility; the consequences of debarment (application across the Executive Branch); and the effective dates of debarment. The decision shall notify the contractor that it may request a copy of the Administrative Record. The SDO Admin will enter the debarred contractor into SAM.

iv. Enter into an Administrative Agreement. At any time during the proceedings, the SDO may negotiate an Administrative Agreement with the contractor. An Administrative Agreement applies across the Executive Branch when entered into SAM. The terms of the Administrative Agreement and contents of the Agreement will be determined on a case-by-case basis.

e. Contractor's Remedy. After a decision is made, a suspended or debarred contractor may seek judicial review. OGC (in coordination with the Department of Justice, as appropriate or required) will work with the referring office, the SDO, and OCFO to litigate these claims.

**H. NCUA Action after a Decision.** If a suspension or debarment is imposed, NCUA offices must take steps to ensure the contractor does not receive any new

contracts. Upon the effective date of SAM listing, the NCUA must not solicit offers from, award contracts to, or consent to contracts with ineligible contractors. Suspended or debarred contractors may continue performing current contracts (unless those contracts are terminated or voided) but cannot (a) add new work, exercise options, or otherwise extend the duration of the contract or order; (b) issue task orders exceeding the guaranteed minimum under indefinite quantity contracts; or (c) place orders under blanket purchase agreements or basic ordering agreements. The NCUA must review any current contracts held by the contractor to determine whether to terminate or void those contracts. A decision to terminate or void a contract requires OGC concurrence.

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